Filed 4/25/06 In re Donald J. CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re DONALD J., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. DONALD J., Defendant and Appellant.	A111348 (Contra Costa County Super. Ct. No. J03-01644)

Appellant Donald J. appeals after he admitted a probation violation and the juvenile court committed him to the California Youth Authority (CYA). On appeal, he contends the juvenile court erred in failing to designate a prior sustained count for assault by means of force likely to produce great bodily injury—a "wobbler"—as a misdemeanor or felony before committing him to CYA. We shall affirm the juvenile court's orders.

PROCEDURAL BACKGROUND

On January 12, 2004, a second amended juvenile wardship petition was filed, pursuant to Welfare and Institutions Code section 602,[1] alleging that appellant had committed: (1) second degree robbery (Pen. Code, §§ 211/212.5, subd. (c)–count one, a

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

felony); (2) second degree burglary (Pen. Code, §§ 459/460, subd. (b)–count two, a misdemeanor (Pen. Code, §§ 242/243, subd. a)–count three, a misdemeanor); and (4) vandalism (Pen. Code, §§ 594, subd. b))–count four, a misdemeanor). On January 21, 2004, the prosecutor amended the complaint again to add an allegation that appellant had committed assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)–count five, a felony).

Also on January 21, 2004, appellant pleaded no contest to counts three and five, and counts one, two and four were dismissed. At the February 4, 2004 dispositional hearing, the juvenile court adjudged appellant a ward of the court and committed him to a county ranch facility for 180 days.

On March 30, 2004, a supplemental petition was filed, which alleged that appellant had escaped from a county institution (§ 871, subd. (a), a misdemeanor). On April 8, 2004, appellant admitted the allegation, after which he eventually was placed in the Trinity Anza program. On January 18, 2005, after appellant successfully completed the program at Trinity Yucaipa,[2] his placement was set aside, and he was returned to his mother's custody.

On February 23, 2005, a second supplemental petition was filed, which alleged that appellant had committed attempted second degree robbery (Pen. Code, §§ 211/212.5, subd. (c)/664, a felony). On April 1, 2005, following a contested jurisdictional hearing, the juvenile court sustained the allegation. At the April 15, 2005 dispositional hearing, the juvenile court suspended a commitment to CYA and ordered appellant placed outside the home on probation, which included the requirement that appellant complete a six-month program at a boys' ranch.

On May 17, 2005, appellant admitted violating probation by leaving his boys' ranch program without permission and stealing alcohol from a convenience store. On

[2] Appellant had been transferred to Trinity Yucaipa in November 2004, after the Trinity Anza program had closed.

July 26, 2005, the juvenile court committed appellant to CYA, with a maximum confinement period of four years eight months.

On August 31, 2005, appellant filed a notice of appeal.

DISCUSSION

Appellant contends the juvenile court erred in failing to designate the assault by means of force likely to produce great bodily injury count as a felony or misdemeanor, pursuant to section 702.

Penal Code section 245, subdivision (a)(1), assault by means of force likely to produce great bodily injury, is known as a "wobbler" because it is an offense that, in the case of an adult, could be punishable alternatively as a felony or a misdemeanor. (§ 702.) With wobblers, the juvenile court "shall declare the offense to be a misdemeanor or felony." (*Ibid*.) In *In re Manzy W.* (1997) 14 Cal.4th 1199, 1204, our Supreme Court explained that section 702 "requires an explicit declaration by the juvenile court whether an offense would be a felony or misdemeanor in the case of adult . . . . [¶] The requirement is obligatory." Whether remand is required depends on "whether the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement time." (*Id*. at p. 1209.)

Respondent asserts that appellant's claim cannot succeed both because appellant never made the claim in the juvenile court and because appellant never appealed his wardship adjudication for the assault by means of force likely to produce great bodily injury, at least on the ground urged in this appeal. Appellant counters that he is not appealing from the original jurisdictional finding. Rather, according to appellant, he appeals from the May 17, 2005 sentencing hearing at which the trial court, for the first time, calculated the maximum period of confinement. At that hearing, the court fixed the maximum term on the assault count at four years, which is the maximum felony term for an adult.

First, we agree that appellant has waived his claim that the juvenile court failed to exercise its discretion, under section 702, due to his failure to raise it in the trial court. (See, e.g., *People v. Turner* (2004) 96 Cal.App.4th 1409, 1412.)

In addition, even had the issue been preserved, appellant has failed to provide an adequate record to support his claim. The record on appeal does not include the reporter's transcripts from the original jurisdictional and dispositional hearings related to the assault allegation, where we would expect to find the court's oral declaration under section 702. From this limited record, we are unable to determine whether the court made a section 702 oral declaration at the original jurisdictional or dispositional hearings. It was appellant's responsibility to provide an appellate record sufficient to substantiate his claim of error. In light of appellant's failure to provide a complete record, we adhere to " 'the fundamental principle that all presumptions and intendments are in favor of the regularity of the action of the lower court in the absence of a record to the contrary.' " (See *People v. Green* (1979) 95 Cal.App.3d 991, 1001; compare *In re Manzy W.*, *supra*, 14 Cal.4th at pp. 1202-1203, 1210-1211 [on direct appeal from challenged wardship finding, examination of record permitted Supreme Court to conclude that juvenile court had failed to satisfy section 702 requirement].)

Finally, even were we to address the merits of appellant's claim, we note that, in exchange for the dismissal of three counts, appellant pleaded no contest to two counts, including count five, described as Penal Code section "245(a)(1) a felony. Count is not a strike but is a 707 b offense." Since the plea agreement, entered into by appellant and accepted by the juvenile court, stated that the assault was a felony, there was no "wobbler" that required the court's express characterization as a felony or misdemeanor, under section 702. Appellant may not now attempt to invalidate the portion of the plea agreement in which he admitted to a felony violation of Penal Code section 245, subdivision (a)(1), by claiming that the court failed to exercise its discretion as required by section 702. (See, e.g., *People v. Panizzon* (1996) 13 Cal.4th 68, 80 [when a guilty plea is entered in exchange for specified benefits, both parties must abide by terms of

agreement]; *People v. Velasquez* (1999) 69 Cal.App.4th 503, 507 [a defendant may not retain favorable aspects of plea agreement while rejecting unfavorable aspects].)

DISPOSITION

The juvenile court's orders are affirmed.

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Kline, P.J.

We concur:

_____
Haerle, J.

_____
Richman, J.